86-1043

CASE NO.:

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

JULIO T. GONZALEZ,

PETITIONER,

-vs-

SHELL OIL COMPANY,

RESPONDENT.

_____/

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR

THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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35 pp

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE DISMISSAL OF THE ACTION BY THE DISTRICT COURT SUA SPONTE FOR REASONS RAISED IN AN AFFIRMATIVE DEFENSE WAS APPROPRIATE WHERE PURSUANT TO THE SHELL STANDARD DEALER AGREEMENT SHELL OIL COMPANY DELIVERS TO ITS DEALERS A SMALLER VOLUME OF PETROLEUM FUEL THAN WHICH ITS DEALERS PAID FOR.

II. WHERE THE STANDARD DEALER AGREEMENT DOES NOT DEFINE THE WORD "GALLON" SHOULD THE DISTRICT COURT HAVE ALLOWED A JURY TO DETERMINE WHETHER THE WORD "GALLON" SHOULD HAVE A STANDARD DEFINITION OR EQUITABLE MEANING AS UTILIZED IN THE INDUSTRY.

PARTIES TO THE PROCEEDINGS

The Petitioner, Julio T. Gonzalez, is suing on behalf of himself and Shell Oil Dealers in the States of Alabama, Arizona, California, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Nevada, Tennessee, Texas and Virginia, i.e., all Shell Dealers in states whose average annual ambient temperature exceeds 60 degrees Fahrenheit.

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REFERENCE TO OPINIONS OF LOWER COURTS

The unpublished opinion of the Eleventh Circuit Court of Appeals, the order denying plaintiff's petition for rehearing, also in the appellate court, and the district court's order dismissing the action are reproduced in the Appendix.

JURISDICTIONAL STATEMENT

The judgment of the Eleventh Circuit Court of Appeals was entered on July 31, 1986, affirming the November 29, 1985, dismissal of the Petitioner's complaint. The Court of Appeals denied the timely petition for rehearing on September 19, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked under 28 U.S.C. §1332 because of diversity of citizenship, the plaintiff being a citizen of Florida and the defendant being a Delaware corporation with its principal place of business in Texas.

References herein shall be made to the Docket Number of the pleadings and to the page number of the Record Excerpts designated "RE" as the Record stood in the district court.

The petitioner filed the complaint for damages in the District Court for the Southern District of Florida on behalf of himself and all other dealers similarly situated against Shell Oil Company for losses in deliveries of petroleum products from Shell Oil to petitioner.

The plaintiff and defendant operate under a Standard Dealer Agreement, attached to the complaint as Exhibit "A." RE 4-46. The

Dealer Agreement does not require that Shell Oil sell temperature compensated gasoline gallons to its dealers, but neither does the Agreement require that Shell sell the petroleum to its dealers at an ambient or higher temperature (in the southern climate) so that when delivered to the dealers' underground tanks it cools and shrinks.

The defendant, Shell Oil Company's answer to the complaint contained in its first affirmative defense, the following statement:

> "The Complaint, and each and every count thereof, fails to state a claim against Defendant Shell upon which relief can be granted." RE 47-57.

After the parties were directed to brief the issue of class certification plaintiff was denied discovery by interrogatories pending explicit ruling on the class certification issue. Docket Nos. 11 and 21. On November 27, 1985, plaintiff filed a Motion for Leave to File an Amended Complaint Incorporating a Memorandum of Law with exhibits thereto, which

exhibits included an Amended Complaint. RE 60-150. On November 27, 1985, the court entered an "Order Granting Defendant's Motion to Dismiss for Failure to State a Cause of Action." This sua sponte order, which was the subject of the appeal to the Eleventh Circuit was entered without any motion being filed by either party and was based on the first affirmative defense contained in the answer of Shell Oil Company. RE 151-152. On December 9, 1985, plaintiff filed a Motion to Vacate the Order, Docket No. 25, and Memorandum in Support of Motion to Vacate the Order, Docket No. 26, and a Motion of December 10, 1985, for a hearing on Plaintiff's Motion to Vacate the Order, Docket No. 27.

Prior to any response by the defendant, Shell, the district court entered an order filed December 17, 1985, and dated December 16, 1985, denying Plaintiff's Motion for Reconsideration. RE 153. The order recites

that the "Plaintiff's Motion for Leave to File an Amended Complaint is mooted by this order."

The concept of temperature compensation is relatively simple. The volume of petroleum expands and contracts with changes in its temperature on a relatively substantial basis. Since gasoline expands in warm weather, a gallon delivered in a place where the average air temperature is above 60 degrees Fahrenheit has less fuel capacity than when delivered in colder weather at which time the gasoline contracts in volume. Since changes in temperature of the petroleum change its potential value inequities in sales and purchases of petroleum exist unless gasoline is bought and sold at an adjusted constant standard temperature. As it is impossible to keep petroleum at a constant temperature, the petroleum industry commonly sets a standard temperature at which virtually all oil volumes can be adjusted for accounting purposes in a sale or other transaction.

The petroleum industry generally adjusts this inequity by defining a gallon as it relates to petroleum and petroleum products as 230 cubic inches at 60 degrees Fahrenheit. This is evident throughout the American Petroleum Industry Manual of Petroleum Measurement Standards, Volumes 1 and 2, and the United States National Bureau of Standards, copies of which were attached to plaintiff's complaint.

Defendant, Shell Oil Company, purchases its product on a temperature compensated basis, a fact admitted in its answer in this case. Nonetheless, Shell refuses to temperature compensate on its sales to dealers. Plaintiff's attempt to amend the complaint, which attempt was mooted by the district court's order filed December 17, 1985, denying Plaintiff's Motion for Reconsideration, sought compensation from Shell for an overbilling for prepayment by the dealer of state and federal taxes. Shell Oil

collects from its dealers state and federal taxes on a pre-paid "temperature-uncompensated" basis. However, the dealer is able to be recompensated for his tax pre-payment from sales to the consumer at the cooler and lesser gallon-volume amount; the dealer pre-pays taxes at time of delivery on a per-gallon basis on more gallons than he is able to sell from his pumps because the temperature heated gasoline has cooled and shrank in his underground storage tanks.

The Dealer Agreement does not make reference to any requirement for temperature compensation in the sale of petroleum from Shell to plaintiff. Nor does the contract define the word "gallon". The word gallon is mentioned only once in the Dealer Agreement. In paragraph 7, at page 2 of the Dealer Agreement, under the subheading "Products-Quantities-Quality" it states:

> Shell shall sell and deliver to dealer such quantities of petroleum products [in] the following

specified quantities (in thousands of gallons).... (Emphasis added).

The scientific basis for temperature compensation is well known as is the inequity resulting from Shell Oil's failure to temperature compensate its sales of petroleum products to its dealers. Three states within the ambit of plaintiff's proposed class have enacted statutes mandating temperature compensation; however, the effective dates are relatively recent. Arizona Revised Statute 41-2082 was effective July 27, 1983, Louisiana Revised Statute 51:821 was effective August 30, 1983, and California Business Professional Code 13520, was effective January 1, 1981.

REASONS FOR GRANTING THE WRIT

This is a case of first impression. The Dealer Agreement alleged in the complaint is a standard form contract typical of the type entered into with most if not all the dealers in Florida. The contract does not make any reference as to how the delivery of Shell's petroleum products shall be made to its dealers, i.e., it does not mandate that that the sales shall be on a temperature compensated basis nor does it mandate that the sales shall be at an ambient temperature rate. Plaintiff contends that the word "gallon" as to petroleum products means a temperature compensated gallon as generally and commonly understood in the industry. Defendant Shell contends that the term "gallon" means an amount not adjusted for temperature compensation. Plaintiff's steadfast position is that the contractual provision for payment by the gallon in the Standard Dealer Agreement

is ambiguous and requires extrinsic evidence to determine just what is meant by the "gallon" called for in the contract. Evidence of industry custom and usage is required. The dealer also wants to receive the same amount of gasoline he pays for and is able to resell.

The inequity of this situation is self-evident. Plaintiff, and all dealers similarly situated, purchase petroleum from Shell in an amount that shrinks when it is pumped from above-ground storage tanks at various loading points into transport tankers and then delivered into the dealers' underground storage tanks. When plaintiff sells this petroleum to the public from his service station, it is a less actual volume amount of petroleum than when it was delivered and purchased. The issue raised by this lawsuit, therefore, effects not only the current parties, but the class of dealers in states whose average annual ambient temperature exceeds 60 degrees Fahrenheit, and

the millions of consumers who purchase Shell gasoline at the dealers' service stations as well. Other oil companies operating in warm climate states would look closely to a decision rendered by this Court after being fully briefed on the matter. Indeed, in light of the dominant role occupied by Shell Oil in its relationship with its dealers, reversal of the district court's dismissal of the action with prejudice may be the only chance plaintiff and the proposed class would have to present extrinsic evidence of a latent ambiguity to a court with proper jurisdiction. See, e.g., Burger King Corp. v. Macshara, 724 F.2d 1505, 1512 (11th Cir. 1984); see also Quayside Associates v. Harbour Club Villas Condominium Ass'n, Inc., 419 So. 2d 678, 679 (Fla. 3d. Dist. Ct. App. 1982) ("Where... the terms of the written instrument are disputed and reasonably susceptible to more than one construction, an issue of fact is presented.")

The Eleventh Circuit's affirmance of the district court's dismissal of plaintiff's action leaves plaintiff in a highly inequitable position and one he did not bargain for when he entered into the Standard Dealer Agreement. He receives less petroleum than what he pays for. In selling his petroleum to the motoring public, he may feel, or in fact is compelled to feel, by the instinct to survive, that he must rectify the net loss by either charging an artificially high price for a "gallon" of gasoline, or even worse, artificially heating the petroleum so that it expands to the same volume that he originally purchased from Shell.

The same argument pertains to the process in which Shell collects state and federal taxes from plaintiff and other dealers. Plaintiff attempted to raise this issue in the district court by way of a Motion for Leave to File an Amended Complaint and an accompanying Amended Complaint, but the district court

mooted this motion by its order dismissing the action with prejudice.

(The dealers pre-pay taxes to Shell by the "gallon" on their monthly invoices. Of course this "tax gallon" is at a warmer, ambient temperature (and greater volume) than the same gasoline Shell purchased on the market. However, since Shell purchases its gasoline on a temperature-compensated basis, it may pay less gross tax than it collects from plaintiff.)

Plaintiff collects tax from the public on a cooler and smaller "gallon"; therefore, he cannot and does not recoup his pre-paid tax to Shell based on the warmer and larger "gallon" that was delivered to him.

The Court of Appeals held that dismissal of the complaint was appropriate since the contract does not provide for temperature compensation in the delivery and price of gas. As stated earlier, however, the contract only mentions the word "gallon" once and no

definition is given to that word. The meaning of the word "gallon" could only be determined by reference to custom and usage in the industry and the law of equity. At this juncture, this can be accomplished only by the granting of this petition for certiorari.

The dismissal of the complaint with prejudice based on Shell's first affirmative defense that the complaint fails to state a cause of action woefully fails to accord the procedural due process safeguards a litigant is entitled. It is, in effect, a sua sponte dismissal in violation of Jefferson Fourteenth Assoc. v. Wometco de Puerto Rico, 695 F.2d 524 (11th Cir. 1983). "The trial judge should have given notice of his intention to dismiss, an opportunity to submit a written memorandum in opposition to such motion, a hearing, and an opportunity to amend the complaint to overcome the deficiencies raised by the court...." Jefferson, 695 F.2d at 526 (quoting California Diversified Promotions,

Inc. v. Musick, 505 F.2d 278, 281 (9th Cir. 1981)). The district court in the case at bar took none of these precautions. Dismissal of the case was inappropriate. Therefore, under Czeramcha v. Intern. Ass'n of Mach. & Aero. Workers, 724 F.2d 1552 (11th Cir. 1984), plaintiff's right to ask the court for permission to amend the complaint did not terminate.

CONCLUSION

For all the foregoing reasons this Court should issue a writ of certiorari to the Eleventh Circuit Court of Appeals, directing that court to reverse the district court's dismissal of the complaint with prejudice, and direct that proceedings continue on the issues presented by the amended complaint as a class action.

RESPECTFULLY SUBMITTED, this 18 day of December, 1986.

A. P. WALTER, JR., P. A.
235 Catalonia Avenue
Coral Gables, Fla. 33134
(305) 442-1919

By: _____
A. P. WALTER, JR., ESQ.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) copies of this Petition for Writ of Certiorari was mailed by first-class postage pre-paid, to William Lowerre, Esq., Shell Oil Company, One 4762 Shell Oil Plaza, Houston, Texas 77252-2463, and Sheryll Dunaj, Esq., Fowler, White, Burnett, Hurley, Banick, and Strickroot, P. A., City National Bank Building, Fifth Floor, 25 West Flagler Street, Miami, Florida 33130, this 18 day of December, 1986, and by this Certificate of Service, all parties required to be served have been served.

By: _____
A. P. WALTER, JR., ESQ.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 86-5011
Non-Argument Calendar

JULIO T. GONZALEZ, and all
other similarly situated,

Plaintiff-Appellant,

versus

SHELL OIL COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(July 31, 1986)

Before RONEY AND HATCHETT, Circuit Judges, and HENDERSON, Senior Circuit Judge.

PER CURIAM:

In this diversity jurisdiction action, the plaintiff service station operator seeks damages against Shell Oil Company because it did not adjust the price of gasoline sold to plaintiff to reflect temperature variations. Since gasoline expands in warm weather, a gallon delivered in a place where the average air temperature is above 60% Fahrenheit has less fuel capacity than when delivered in colder weather, at which time the gasoline is contracted. The district court properly dismissed the complaint for failure to state a cause of action on the ground that the contract is unambiguous and does not provide for temperature compensation in the delivery and price of gas. We affirm.

The district court decided that the dealer agreement alleged in the complaint is a

standard form contract typical of the type entered into with most if not all the dealers in Florida. The contract makes no reference to any requirement for temperature compensation in the delivery of Shell's gasoline products.

> The parties clearly could have contracted for delivery of gasoline in temperature compensated amounts but failed to do so.

The district court's decision is consistent with Florida franchise contract law, which holds that in construing a contract, the intention of the parties must be ascertained from the language used in the instrument. Trail Burger King, Inc. v. Burger King of Miami, Inc., 187 So.2d 55 (Fla.3d DCA 1966).

Plaintiff's brief notes that the scientific basis for temperature compensation is well known and that Shell has resisted dealers' requests to temperature compensate. Although some states mandate temperature compensation, Florida law appears to have

imposed no such requirement, and thus does not prohibit carrying out the parties' agreement. The district court correctly determined that Gonzalez could prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Bobby Jones Garden Apartments v. Suleski, 391 F.2d 172, 177 (5th Cir. 1968).

Contrary to plaintiff's argument, the dismissal here was not a sua sponte action by the court reversible under Jefferson Fourteenth Assoc. v. Wometco de Puerto Rico, 695 F.2d 524 (11th Cir. 1983) (district court's sua sponte dismissal of the complaint without notice deprived third party plaintiff of its right to procedural due process). Here the defendant had asserted as a defense in its answer, the failure of the complaint to state a cause of action. The district court treated that defense as a motion to dismiss. Any due process or rule violation problems were cured when the district court fully considered a

Motion for Reconsideration and the arguments of plaintiff, fully briefed with the motion.

There is no merit to the argument that the district court in effect granted summary judgment without proper notice and opportunity for argument. The district court clearly treated this matter as a motion to dismiss a complaint and made its determination on the face of the complaint.

Finding that the complaint did not state a cause of action, the district court did not err in failing to certify the class. Neither did the district court err in denying plaintiff's motion to file an amended complaint and in denying any leave to further amend by dismissing the cause with prejudice. This Court has adopted the rule that after a complaint is dismissed, the right to amend under Rule 15(a) terminates. Czeremcha v. Intern. Ass'n. of Mach. & Aero. Workers, 724 F.2d 1552 1556 n.6 (11th Cir. 1984). Plaintiff has suggested no theory upon which

he could prevail in the face of a clear and unambiguous contract.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 86-5011

JULIO T. GONZALEZ, and all
other similarly situated,

Plaintiff-Appellant,

versus

SHELL OIL COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING
(September 19, 1986)

BEFORE: RONEY and HATCHETT, Circuit Judges,
and HENDERSON, Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by appellant is DENIED.

ENTERED FOR THE COURT:

s/Paul H. Roney
United Stated Circuit Judge

REHG-d
(Rev.9/85)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 85-2711-CIV KING

JULIO GONZALEZ, et al.,

Plaintiff,

-vs-

SHELL OIL COMPANY,

Defendant.
_____/

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO STATE A CAUSE OF ACTION

THIS CAUSE arises upon the Defendant's motion to dismiss filed as the Defendant's first defense in their answer.

Accordingly, after a careful review of the record, and the Court otherwise being fully advised in the premises the Court would find as follows:

The Plaintiff is a Shell Oil gasoline dealer who is franchised by the Defendant to sell Shell Oil gasoline products. The dealer agreement entered into between the parties is a standard form contract typical of the type

entered into with most if not all the dealers in Florida. The contract (attached as Plaintiff's exhibit #1 to the complaint) makes no reference to any requirement for temperature compensation in the delivery of Shell's gasoline products. The parties clearly could have contracted for delivery of gasoline in temperature compensated amounts but failed to do so.

The Federal Rules of Civil Procedure only require that the Plaintiff make a short and plain statement of the claim showing that the pleader is entitled to relief. F.R.Civ.P. 8(a) Further when considering a motion to dismiss the court must view the facts as plead in the light most favorable to the Pleader and it is the general rule that a complaint should not be dismissed unless under no conceivable set of facts could the Plaintiff recover. BOBBY JONES GARDEN APARTMENTS v. SULSKI 391 F.2d 172 (5th cir. 1968), POSTON v. AMERICAN

PRESIDENT LINES 452 F.Supp. 568 (S.D. Fla. 1978).

The contract by it's own terms clearly makes no requirement that the gasoline delivered under the contract need be adjusted for temperature variations. The parties could have contracted for such a temperature compensation but they failed to do so.

The State of Florida has no requirement that gasoline need be temperature compensated as some states require. Thus the facts plead even when taken in the light most favorable to the Plaintiff would not support a recovery in this case.

Therefore be it ORDERED and ADJUDGED that the Plaintiff's motion to dismiss as incorporated in their answer be and hereby is GRANTED. This case stands dismissed with prejudice.

DONE and ORDERED in chambers at the United States Courthouse, Federal Courthouse

Square, Miami, Florida this 29th day of November 1985.

s/_____
JAMES LAWRENCE KING
CHIEF U.S. DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

cc:counsel